Supreme Court, U.S.
FILED

95 1163 JAN 16 1996

OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LARRY K. WILLIS
Petitioner

V.

SHELBY COUNTY TENNESSEE, INFORMATION TECHNOLOGY
WILLIAM N. MORRIS, JR.
RICHARD SWIGGART
HENRY MARMON
JOSEPH JACKSON, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
MERRITT, CHIEF JUDGE; KENNEDY, CIRCUIT JUDGE; AND JOINER, DISTRICT JUDGE
CASE NUMBER 95-5107

PETITION FOR A WRIT OF CERTIORARI

LARRY K.WILLIS
IN PROPRIA PERSONA
3354 FAIRBANKS ST.
MEMPHIS, TN. 38128

23 pp

QUESTIONS PRESENTED

1. This Court should grant this Petition to resolve a conflict between the Circuit Courts, and a conflict arising under the Constitution and the Laws of the United States, a clearly established Congressional Law.

2. This Court should grant this Petition to resolve a conflict between Legislative Law and the Constitution of the United States.

3. This Court should grant this Petition as Title 42 U.S.C. @ 1983 guarantees a person's rights to sue there under, if any person violates my Constitutional Rights, and/or Civil Rights.

4. This Court should grant this Petition to resolve a conflict between the Circuit Courts and the Federal Rules of Civil Procedure, Rule 12(a), Defaults.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. . . . . COVER PAGE

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. . . . . .iii & iv

OPINIONS BELOW. 2

JURISDICTION. 2-3

STATUTES, CODES, AND CONSTITUTIONAL PROVISIONS. 3

STATEMENT OF THE CASE. 3-6

THE PROCEEDINGS BELOW. 6-8

REASONS FOR GRANTING WRIT. 8-11

CONCLUSION. 11

INDEX TO APPENDICES. 12

TABLE OF AUTHORITIES

Beverly v. Lone Star Lead Const Corp. 437 F.2d, 1136-1142 (1971) (5th Cir.) 8

Orange Theatre Corp. v. Rayherstz Amusement Corp. 130 F.2d 185.187 (1942) (3rd Cir.) 10

Wood v. Strickland, 420 U.S. 308.327 (1975) 9

CONSTITUTION AND RULES

UNITED STATES OF AMERICA CONSTITUTION.

ARTICLE III 3

ARTICLE V 3

ARTICLE XIV 3

RULES OF THE SUPREME COURT OF THE UNITED STATES, RULE 10.1(a)(b) and (c) 3

FEDERAL RULES OF CIVIL PROCEDURE, RULE 12 . 6

FEDERAL RULES OF CIVIL PROCEDURE, RULE 55 . 6

EQUAL PAY ACT OF 1963, PUBLIC LAW 88-38 . . 4

TITLE 42 U.S.C. @ 1983 4

TITLE VII 42 U.S.C. @ 2000(E) 4

T.C.A 4-21-302 9-

NO._____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1996

LARRY K. WILLIS, Petitioner,

VS.

SHELBY COUNTY TENNESSEE, INFORMATION TECHNOLOGY, et al., Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, LARRY K. WILLIS, in Propria Persona, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit regarding its decision whereby it upheld the United States District

Court's Order of Dismissals as to Title VII of the Civil Rights Act, 42 U.S.C. @ 2000e et seq., Title 42 U.S.C. @ 1983 and the setting aside of Default Judgment against the Defendants, so Ordered the 18th day of October, 1995, see Appendix 13a, and its mandate of the 9th day of November, 1995, see Appendix 18a.

OPINIONS BELOW

The unpublished written Orders of the United States District Court, Western District of Tennessee, Western Division wherein the Trial Court's Order of Dismissal and Order Granting Defendants' Motion to Strike references to Settlement Negotiations, trial docket no. 38 and Order Granting Defendants' Motion to set aside Default, trial docket no. 48.

JURISDICTION

Jurisdiction is conferred upon this United States Supreme Court pursuant to the

U.S.A. Constitution Article III @ 1 and 2; Rules of the Supreme Court of the United States, Rule 10.1(a)(b) and (c).

STATUTES, CODES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

United States of America Constitution, Article III, V, and XIV.

Rules of the Supreme Court of the United States, Rule 10.1(a)(b) and (c).

Federal Rules of Civil Procedure, Rule 12.

Federal Rules of Civil Procedure, Rule 55(a) and (b).

Equal Pay Act of 1963, Public Law 88-38.

Title 42 U.S.C. @ 1983.

Title VII, 42 U.S.C. @ 2000(e)(5)(f)(k)

T.C.A. 4-21-302.

STATEMENT OF THE CASE

This Petitioner was the original Plaintiff in an action complaining of a violation of my Civil Rights and

Constitutional Rights under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. @ 2000e(5)(f)(k), the Equal Pay Act of 1963, Public Law 88-38, and 42 U.S.C. @ 1983 against the Defendants so named on the Cover page of this Petition.

I have been employed by the Shelby County Tennessee Government i.e. the Shelby County Tennessee Information Technology Department and all the other so named Defendants in the original action in the trial court, since the 16th day of March, 1993 and I remain in that said employment.

I worked to establish a consistent pattern of improving myself and to establish my qualifications for advancement. My record clearly indicated I was qualified to fill the position as Data Base Administrator. Yet, due to the inherently discriminatory system of the said Defendants, a white female, was hired and received the position of Data Base

Administrator at an annual salary of approximately $48,000.00. I applied for this said position, and was well qualified to perform it.

My classification is Data Processing Technician and my annual salary was $37,000.00. I work approximately 60 hours per week, including week-ends, to perform my job, while the white female works only 37.5 hours per week. The jobs have different titles, but the qualifications and work tasks performed are essentially identical. We are doing substantially equal work, but I am not receiving equal pay. The white female did not possess the same years of experience and seniority that I do.

I have suffered great and irreparable economic loss of wages, mental anguish, laceration of feelings, shame, degradation, and other aggravations of the said original wrong of discrimination against me by the

said Defendants.

In my original complaint I sought relief in the form of damages, of which I was entitled; actual, exemplary, equitable, punitive, and compensatory damages, and that the Trial Court enjoin the Defendants from continuing unlawful employment practices.

THE PROCEEDINGS BELOW

My original complaint was filed and executed into the Trial Court on the 15th day of July, 1994, and so docketed.

All copies of the complaint and summons were personally served and executed back into the Trial Court on the same date, the 15th day of July, 1994, and so docketed.

After 20 days had elasped, F.R.C.P. Rule 12, I filed for a Clerk's Entry of Default, which was timely and properly entered by the Court's Clerk and entered upon the Docket sheet of my case, pursuant to F.R.C.P. Rule 55(a).

Thereafter, I entered a F.R.C.P. Rule 55(b) motion for Default Judgment by the court and the said motion was set for hearing.

Approximately a week later, the Defendant's counsel filed a motion to set aside the default, I responed timely.

The United States District Court erred in dismissing the Default Judgment against all the Defendants herein.

The Defendants thereafter moved the Trial Court to dismiss my action as to Title VII 42 U.S.C. @ 2000(e), Title 42 U.S.C. @ 1983, and the Equal Pay Act.

I timely responded to Defendants' motion to dismiss with facts and law. A hearing was held and the District Court dismissed all my causes of action.

I appealed both of the Orders of the Trial Court to the Sixth Circuit.

The Sixth Circuit upheld all the

Decisions of the Trial Court except the Equal Pay Act, which was remanded.

REASONS FOR GRANTING WRIT

1. This Court should grant this Petition to resolve a conflict between the Circuit Courts, and a conflict arising under the Constitution and the laws of the United States, a clearly established congressional law.

The Sixth Circuit Court of Appeals is in conflict with the Fifth Circuit Court of Appeals, as the Fifth Circuit upheld a person's substantive rights to sue under Title VII in the Federal Courts as set forth in **Beverly v. Lone Star Lead Const Corp, 437 F2d, 1136-1142 (1971) (5th Cir.)**, and as the Sixth Circuit has disagreed with the Fifth Circuit pursuit to its decision in my case, see Order Appendix Ax. The Sixth Circuit should have remanded my case as the 5th Circuit did in **Beverly id, page 1142** and

remanded for a trial of appellant's claim on the merits.

2. This Court should grant this Petition to resolve a conflict between legislative law and the Constitution of the United States. Under 42 U.S.C. @ 2000e(5) and T.C.A. 4-21-302 only allows 180 days to file complaints under Title VII which is based upon the action of the 6th Circuit, the courts are now closed to me, thus violating the U.S. Constitution, Article V. Due Process law and Article XIV, Equal Protection of the laws, and this court clearly establised this right in **Wood v. Strickland**, 420 U.S. 308,327 (1975).

3. This Court should grant this Petition as Title 42 U.S.C. @ 1983 guarantees a person's rights to sue there under, if any person violates my Constitutional Rights, or Civil Rights.

The 6th Circuit has denied my right to

sue under Title 42 U.S.C. @ 1983 and has thus violated my substantive rights to Due Process of the law and Equal Protection of the law, U.S.C.A. @ Article V and XIV and under **Wood v. Strickland id.**

4. This court should grant this Petition to resolve a conflict between the Circuit Courts and the Federal Rules of Civil Procedure, Rule 12(a), Defaults.

F.R.C.P. Rule 12(a) sets forth a complaint must be answered in 20 days, in **Orange Theatre Corp. v. Rayherstz Amusement Corp. 130 F2d 185.187 (1942) (3rd Cir)**, states that if a defendant fails to plead, answer, or otherwise defend within the 20 days allotted under Rule 12(a), he/they are in default, **p.187 Orange id.** The 6th Circuit disagrees with the Rule(s) and are in conflict with the other Circuit Courts in this matter.

Therefore, the United States Supreme

Court should grant this Petition for a Writ of Certiorari to resolve a conflict between the Circuit Courts as claims, case, and substantive rights arises under the United States Constitution, and the Laws of the United States.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued to review the Order of the 6th Circuit Court of Appeals, in this matter.

Date: January 16, 1996.

Respectfully Submitted,
Without Prejudice.

Larry K. Willis
3354 Fairbanks St.
Memphis, Tn. 38128
(901) 383-2241

INDEX TO APPENDICES

ORDER U.S. COURT OF APPEALS 6TH CIR. OCTOBER 18TH, 1995. . . . . 13a

MANDATE U.S. COURT OF APPEALS 6TH CIR. NOVEMBER 9TH, 1995. . . . . 18a

No. 95-5107

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY K. WILLIS, Plaintiff-Appellant, v. WILLIAM N. MORRIS, JR; RICHARD SWIGGART; HENRY MARMON; JOSEPH JACKSON; SHELBY COUNTY TENNESSEE INFORMATION TECHNOLOGY Defendants-Appellees	)	ORDER NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

BEFORE: MERRITT, Chief Judge; KENNEDY, Circuit Judge, and JOINER, District Judge.*

Larry K. Willis, a pro se Tennessee Citizen, appeals the dismissal without prejudice of his employment discrimination action filed under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and 42 U.S.C. @ 1983. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.

App. P. 34(a).

Seeking forty-five million dollars and injunctive relief, Willis filed this action against his employer, a county agency, and several county officials, claiming that he had been denied promotion and received less pay for similar work than a female co-worker. Willis sought and was granted an entry of default. One week after the expiration of the period for responding to the complaint, defendants moved to set aside the entry of default, which motion was granted after oral arguments. Defendants also moved for dismissal of the complaint, and to strike references to settlement negotiations, both of which motions were subsequently granted. On appeal, Willis argues, among other issues, that the district court erred in setting aside the entry of default because he did not file a separate notice of appeal from that ruling. Defendants' brief also addresses the

grounds relied on by the district court in dismissing the complaint, as well as the meerits of the underlying sex discrimination claim.

Upon review, we reject defendants' argument that Willis is barred from appealing the ruling setting aside the entry of default. The notice of appeal from the final judgment in this action was sufficiant to preserve a challenge to all the district court's prior nonfinal rulings. *See Cattin v. General Motors Corp.*, 955 F.2d 416, 428 (6th Cir. 1992). However, we also conclude that the district court did not abuse its discretion in setting aside the entry of default. *See INVST Financial Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391,398-99 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987).

The claim under Title VII, 42 U.S.C. @ 2000e et seq., was properly dismissed without prejudice for failure to exhaust

administrative remedies, as Willis admitted he had not yet received a notice of right to sue. Whether construed as a jurisdictional prerequisite or a condition precedent, the requirement of receiving a notice of right to sue was properly invoked by the district court as Willis made not argument for equitable relief from the condition. See *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1486-88 (6th Cir. 1989). The claim under 42 U.S.C. @ 1983 was also properly dismissed, as Title VII provides the exclusive remedy for the employment discrimination alleged here. *See Allen v. Denver Pub. School Bd.*, 928 F.2d 978,982 (10th Cir. 1991) (per curiam).

However, the district court erred in dismissing the claim under the Equal Pay Act, 29 U.S.C. @ 206, for the same reason that the Title VII claim was dismissed. The Equal Pay Act contains no requirement to exhaust

administrative remedies before bring an action in the district court. *See County of Washington v. Gunther*, 452 U.S. 161, 175 n.14 (1981);*Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1527 (11th Cir. 1992).

The remaining arguments raised by Willis on appeal are frivolous. Defendants' discussion of the merits of the sex discrimination claim is misplaced, as no judgment on the merits is under appeal.

Accordingly, the dismissal of the Equal Pay Act claim is vacated and the matter remanded for further proceedings. In all other respects, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

*The Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 95-5107

Filed: November 9, 1995

LARRY K. WILLIS
Plaintiff - Appellant

v.

WILLIAM N. MORRIS, JR.; RICHARD SWIGGART; HENRY MARMON; JOSEPH JACKSON; SHELBY COUNTY TENNESEE INFORMATION TECHNOLOGY
Defendants - Appellees

MANDATE

Pursuant to the court's disposition that was filed 10/18/95 the mandate for this case hereby issues today.

A TRUE COPY.

COSTS: NONE

Attest:

Filing fee .....$
Printing .....$

Total .....$

Patricia J. Elder
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

(2)

NO. 95-1163

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LARRY K. WILLIS
Petitioner

V.

SHELBY COUNTY TENNESSEE, INFORMATION TECHNOLOGY
WILLIAM N. MORRIS, JR.
RICHARD SWIGGART
HENRY MARMON
JOSEPH JACKSON, et al.
Respondents

SUPPLEMENTAL APPENDIX

CASE NUMBER 95-5107

LARRY K.WILLIS
IN PROPRIA PERSONA
3354 FAIRBANKS ST.
MEMPHIS, TN. 38128

INDEX TO SUPPLEMENTAL APPENDICES

DISTRICT COURT ORDER OF DISMISSAL AND ORDER GRANTING DEFENDANTS' MOTION TO STRIKE REFERENCES TO SETTLEMENT NEGOTIATIONS, NOVEMBER 25TH, 1994. . . . . 2a

DISTRICT COURT DECISION AND JUDGEMENT, NOVEMBER 30TH, 1994. . . . . 6a

DISTRICT COURT ORDER GRANTING DEFENDANTS' MOTION TO SET ASIDE DEFAULT, JANUARY 23RD, 1995 . . . . . 7a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LARRY K. WILLIS	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 94-2575-M1/Bro
	)	
SHELBY COUNTY TENNESSEE	)	
INFORMATION TECHNOLOGY,	)	
WILLIAM N. MORRIS, JR.,	)	
RICHARD SWIGGART,	)	
HENRY MARMON,	)	
JOSEPH JACKSON, et al.,	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL AND ORDER GRANTING DEFENDANTS' MOTION TO STRIKE REFERENCES TO SETTLEMENT NEGOTIATIONS

This cause came to be heard on October 28, 1994. Based upon the statements of counsel and the plaintiff, it appears to this Court that the defendants' Motion to Dismiss should be GRANTED and this matter DISMISSED without prejudice for the reasons stated below.

Plaintiff's claim based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e(5) et seq., is DISMISSED without prejudice because plaintiff has failed to properly exhaust his administrative remedies as required by Title VII in that he has not received a statutory notice of the right-to-sue. See Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1485-87 (6th Cir. 1989).

Plaintiff's claim based upon 42 U.S.C. @ 1983 is DISMISSED without prejudice because Title VII provides the exclusive remedy when the only 1983 cause of action is based on a violation of Title VII, and plaintiff's Title VII claim has been dismissed because it is premature.

Plaintiff's claim based upon the Equal Pay Act (EPA), 29 U.S.C. @ 206, is also

DISMISSED without prejudice because plaintiff has not received the prerequisite right-to-sue letter. Enforcement of the Equal Pay Act is the responsibility of the Equal Employment Opportunity Commission pursuant to the Reorganization Plan No. 1 of 1978, Section 1, 43 F.R. 19807, 92 Stat. 3781. Once a charge has been filed with the EEOC, the EEOC regulations governing the issuance of notices of right-to-sue prevail.(1)

Further, defendants' motion to strike appears well taken. The references to settlement negotiations now in the record through plaintiff's response to defendant's Motion to Dismiss are not relevant to the motion and are therefore sticken from the record.

Based on the foregoing IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the

defendants' Motion to Dismiss is hereby GRANTED and this case is dismissed without prejudice and the defendants' Motion to Strike References to Settlement Negotiations is also granted.

ENTERED this 25 day of November, 1994.

Jon P. McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

(1) Defendant argues that the EEOC rules governing notices of right-to-sue, 29 C.F.R. @ 1601.28(b)(1), prevail in EPA claims. Based on this Court's research, at least one court appears to have acknowledged that a plaintiff must exhaust his or her administrative remedies, including reciept of a right-to-sue letter prior to bringing a claim under the EPA. See Danielson, et al. v. Du Page Area Vocational Educ. Auth., 595 F. Supp 27, 28-29 (N.D. I1 1984) The parties have not cited any case to the contrary nor has this Court found any.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LARRY K. WILLIS

VS

JUDGEMENT IN A CIVIL CASE

SHELBY COUNTY TENNESSEE
INFORMATION TECHNOLOGY,
WILLIAM N. MORRIS, JR.,
RICHARD SWIGGART, HENRY
MARMON, JOSEPH JACKSON, et al.

CASE NO: 94/2575-M1/Bro

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order of Dismissal entered on November 25, 1994, this cause is hereby dismissed, without prejudice.

APPROVED:

JON P. McCALLA
JON PHIPPS MCCALA
UNITED STATES DISTRICT COURT

NOV. 30,1994
Date

ROBERT R. DITROLIO
Clerk of Court

Wendy Blackledge Ellis
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LARRY K. WILLIS	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 94-2575-M1/Bro
	)	
SHELBY COUNTY TENNESSEE INFORMATION TECHNOLOGY, WILLIAM N. MORRIS, JR., RICHARD SWIGGART, HENRY MARMON, JOSEPH JACKSON, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO SET ASIDE DEFAULT

This matter is before the Court on defendants's Motion to Set Aside Default, filed August 11, 1994. Oral argument on this motion was heard at this Court's Motion Call on September 30, 1994. Attorney Dedrick Brittenum, Jr., appeared for the defendants, and the plaintiff appeared pro se.

On September 30, 1994, in open court, this Court granted defendants' Motion to Set Aside Default. Pursuant to this Court's oral grant of defendants' motion, defendants' Motion to Set Aside Default was hereby GRANTED. For purposes of clarification, the Court is entering this order in written form.

SO ORDERED, THIS 23 DAY OF JANUARY, 1995.

JON P. McCALLA
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 21 1996
CLERK

No. 95-1163

In The

Supreme Court of the United States

October Term, 1995

LARRY K. WILLIS,

Petitioner,

vs.

SHELBY COUNTY TENNESSEE INFORMATION TECHNOLOGY, WILLIAM N. MORRIS, JR., RICHARD SWIGGART, HENRY MARMON, JOSEPH JACKSON, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record:

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(901) 575-0100

Attorney for Respondents

STATEMENT OF ISSUES

A. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, CODIFIED AT 42 U.S.C. §2000e.

B. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON 42 U.S.C. §1983.

C. THERE IS NO CONFLICT BETWEEN FEDERAL RULE OF CIVIL PROCEDURE 12(a) AND CIRCUIT COURTS OF APPEAL REGARDING PROCEDURES FOR DEFAULT.

TABLE OF CONTENTS

STATEMENT OF ISSUES i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION OF SUPREME COURT 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IS CORRECT AND THERE IS NO CONFLICT OR ANY OTHER BASIS FOR FURTHER REVIEW BY THIS COURT. 9

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO VIOLATION OF DUE PROCESS RIGHT OR EQUAL PROTECTION UNDER THE LAWS BY THE OPERATION OF THE TITLE VII STATUTORY SCHEME. 14

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON 42 U.S.C. §1983 IS CORRECT AND THERE IS NO CONFLICT OR ANY OTHER BASIS FOR REVIEW BY THIS COURT. 15

D. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN FEDERAL RULE OF CIVIL PROCEDURE 12(a) AND CIRCUIT COURTS OF APPEAL REGARDING PROCEDURES FOR DEFAULTS. 18

CONCLUSION 22

TABLE OF AUTHORITIES

CASES:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). 10

Allen v. Denver Pub. School Bd., 928 F.2d 978 (10th Cir. 1991) (per curiam) 16

Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971) 12-13

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 15

Invst Financial Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391 (6th Cir. 1987) 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10

Puckett v. Tennessee Eastman Co., 889 F.2d 1481 (6th Cir. 1989) 11

United Coin Meter v. Seaboard Coastline R.R., 705 F.2d 839 (6th Cir. 1983) . 19-20

Wilson v. Winstead, 84 F.R.D. 218 (D.C. Tenn. 1979) 21

Wood v. Strickland, 420 U.S. 308 (1975) . 16-17

RULES:

Rule 10 of the Rules of Supreme Court of the United States 9

Federal Rules of Civil Procedure, Rule (6)(a) . . . 18-19

Federal Rules of Civil Procedure, Rule 12(a) 18

STATUTES:

42 U.S.C §1983 . . . . . passim

42 U.S.C. §2000e et seq. . . . . passim

OPINIONS BELOW

The October 18, 1995 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is Case No. 95-5107, is unpublished, and is reprinted in the separate Appendix to the Petition, pp. 13a-18a. The prior opinion of the United States District Court for the Western District of Tennessee entered on November 25, 1994, is Case No. 94-2575-M1/Bro, is unpublished, and is reprinted in the separate Supplemental Appendix to the Petition, pp. 2a-6a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1995. The Petition for Writ of Certiorari was filed on January 16, 1996, and docketed on January 22, 1996. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUES INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §2000e-2

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ace, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. SUMMARY OF PROCEDURAL HISTORY

The plaintiff and Petitioner, Larry K. Willis, filed this action in the United States District Court for the Western District of Tennessee on July 15, 1994. In the Complaint, Petitioner alleged violations of federal statutory and constitutional rights by Shelby County Tennessee Information Technology and several individual employees of this department of local government (collectively referred to as Respondents). Petitioner brought suit pursuant to 42 U.S.C. §1983, 42 U.S.C. §2000e (Title VII of the Civil Rights Act of 1964), and 29 U.S.C. §206 (the Equal Pay Act of 1963).

On August 4, 1994, Petitioner requested an entry of default on the alleged basis that Respondents had failed to timely respond to the Complaint. Default was entered as to the individual Respondents on August 8, 1994. On August

9, 1994, Petitioner moved for default judgment by the district court against Shelby County Tennessee Information Technology and the individual Respondents.

On August 11, 1994, Respondents filed a motion and supporting memorandum to set aside the defaults. Respondents answered Petitioner's Complaint on August 18, 1994. Respondents moved the district court to dismiss the cause on August 26, 1994.

After a motion hearing held on September 30, 1994, United States District Court Judge Jon McCalla granted Respondent's motions to set aside default, denied the motions for default judgment against all Respondents, and allowed Petitioner an additional fourteen (14) days to respond to Respondents' motion to dismiss. Respondents filed a motion to strike references Petitioner made to settlement negotiations in his response to Respondents' motion to dismiss.

On November 25, 1994, Judge McCalla granted Respondents' motion to dismiss this action. Respondents'

motion to strike references to settlement negotiations was also granted on this date. Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals on December 21, 1994, appealing the November 25, 1994 Order of Dismissal. On January 23, 1995, Judge McCalla entered a written order granting Respondents' motion to set aside default as to all Respondents. Judge McCalla had previously granted Respondents' motions to set aside default on September 30, 1994, but no written order was entered until January 23, 1995.

The Sixth Circuit Court of Appeals vacated the district court's dismissal of Petitioner's Equal Pay Act claim and remanded this issue for further proceedings. The district court's judgment as to all other claims -- those based upon 42 U.S.C. §1983 and 42 U.S.C. §2000e -- was affirmed on October 18, 1995.

B. STATEMENT OF FACTS

In his Complaint, Petitioner, a white male, alleged that he worked for Respondents from August of 1989 until May 1, 1992, resigned, and returned to Respondents' employment on March 16, 1993, where he remains employed as a Data Base Technician. Petitioner alleged that a white female was hired and received the position of Data Base Specialist. Petitioner alleged that he was qualified for this position and that he applied for this position. Petitioner alleged that he is not receiving equal pay for equal work in violation of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and 42 U.S.C. §1983. All claims were dismissed by the district court. The Sixth Circuit vacated the dismissal of the Equal Pay Act claim and remanded it for further proceedings, affirming the dismissal of Petitioner's claims based on 42 U.S.C. §1983 and Title VII of the Civil Rights Act.

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SUMMARY OF ARGUMENT

The claims raised by the Petitioner in this action have been properly dismissed by the lower courts. There are no special and important reasons which would warrant review by the United States Supreme Court.

The Sixth Circuit Court of Appeals properly affirmed the District Court's dismissal of Petitioner's claim under Title VII of the Civil Rights Act of 1964 for failure to exhaust administrative remedies, as Petitioner admitted he had not yet received a notice of right to sue from the Equal Employment Opportunity Commission ("EEOC"). There is no conflict among Circuit Courts regarding the requirement of exhaustion of administrative remedies.

The Sixth Circuit Court of Appeals properly affirmed the District Court's dismissal of Petitioner's claims based on 42 U.S.C. §1983 because Title VII of the Civil Rights Act of 1964 provides the exclusive remedy for the employment

discrimination alleged by the Petitioner. There is no conflict among Circuit Courts regarding this issue.

There is no conflict among the Circuit Courts regarding procedures for entries of default or default judgment. The Sixth Circuit Court of Appeals was correct in concluding that the District Court did not abuse its discretion in setting aside the entry of default.

Thus, the Sixth Circuit's affirmation of the District Court's dismissal of claims based on Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1983 should stand. Likewise, the Sixth Circuit's conclusion that the District Court did not abuse its discretion in setting aside the entry of default in this case should stand. Petition for Writ of Certiorari to the United States Supreme Court should be denied.

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ARGUMENT

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IS CORRECT AND THERE IS NO CONFLICT OR ANY OTHER BASIS FOR FURTHER REVIEW BY THIS COURT.

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only when there are special and important reasons therefor." The text of the rule sets forth specific reasons that satisfy this standard, which include conflicts between decisions of various circuit courts of appeal or decisions by state or federal courts concerning significant issues of federal law.

This action fails to meet the standard of Rule 10. This action involves the proper dismissal of claims based on Title VII of the Civil Rights Act of 1964 and 42 U.S.C.

§1983, and presents no special or important circumstances which would distinguish it from numerous other cases. The issues of this case are not of a magnitude sufficient to warrant review by this Court.

The Sixth Circuit Court of Appeals properly affirmed the District Court's dismissal of Petitioner's claims based on Title VII of the Civil Rights Act of 1964 because Petitioner has failed to properly exhaust his administrative remedies as required by Title VII. Title VII vests federal courts with plenary powers to enforce its statutory requirements. The statute "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). These prerequisites are generally met when a plaintiff (1) files a timely charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"), and (2)

receives and acts upon the EEOC's statutory notice of the right to sue. Id.

Petitioner readily admitted in his Complaint that he had not received a statutory notice of right to sue. (Plaintiff's Complaint at ¶5; Record Document No. 1). The Sixth Circuit properly held that, whether construed as a jurisdictional prerequisite or a condition precedent, the requirement of receiving a notice of right to sue was properly invoked by the District Court because Petitioner made no argument for equitable relief from the condition. See Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1486-88 (6th Cir. 1989). Clearly, Petitioner had not satisfied the requirements of Title VII and his claim brought under this statute was properly dismissed as prematurely brought before the District Court.

Petitioner alleges that the decision of the Sixth Circuit in affirming the dismissal of claims under Title VII is in conflict with the Fifth Circuit Court of Appeals' ruling in

Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136 (5th Cir. 1971). The Fifth Circuit's opinion in Beverly does not conflict with the decision of the Sixth Circuit in this case. In Beverly, the court was called upon to decide whether an actual finding by the EEOC that there is "no reasonable cause" to believe that a violation of Title VII has occurred will defeat jurisdiction of a federal court in a civil suit. The Beverly court found that federal courts should not deny a grievant an opportunity to prove the allegations of his Complaint solely on the basis of a conclusion by the EEOC that reasonable cause does not exist, and reversed and remanded the judgment of the district court. 437 F.2d at 1141. In the case at bar, Petitioner is not in a position of having received a "no reasonable cause" determination and then having a federal court refuse to hear his claim, as was the situation in Beverly. In this case, Petitioner received no notice from the EEOC.

The Beverly court stated:

> It is our interpretation of Title VII that there exists an absolute right in each complainant to bring a civil action in federal court. This right, however, is subject to one important proviso: The complainant must comply with the minimum jurisdictional requirements necessary to allow the opportunity for conciliation to mature.
>
> * * * *
>
> We conclude therefor, that the administrative remedies available from the EEOC must be "exhausted" in the traditional sense of the term, as a prerequisite to federal suit.

437 F.2d at 1140 (emphasis added). Petitioner filed his federal suit before receiving his notice of the right to sue and his Title VII Claim was thus properly dismissed. There is no conflict among the Circuit Courts as to the issue raised by Petitioner. The District Court's dismissal of Petitioner's claims based on Title VII was properly affirmed by the Sixth Circuit.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO VIOLATION OF DUE PROCESS RIGHT OR EQUAL PROTECTION UNDER THE LAWS BY THE OPERATION OF THE TITLE VII STATUTORY SCHEME.

Petitioner's contention that constitutional guarantees of due process of law and equal protection under the law are violated by the statutory scheme of Title VII of the Civil Rights Act of 1964 is without merit. Contrary to Petitioner's argument, the ability to file a complaint based on Title VII is not conditioned upon the action of the Sixth Circuit Court of Appeals. The notice of right to sue issued by the EEOC grants a claimant an individual cause of action against his employer, provided that the claimant files a federal suit within ninety (90) days of receipt of such letter. 42 U.S.C. §2000e-5(f)(1). Petitioner had not received a right to sue letter prior to initiating his federal action. No issues of due process or equal protection are raised by the

Title VII scheme operating as Congress intended. Petitioner's allegations are meritless and present no special or important circumstances which distinguish this issue from those in numerous other cases.

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF CLAIMS BASED ON 42 U.S.C. §1983 IS CORRECT AND THERE IS NO CONFLICT OR ANY OTHER BASIS FOR REVIEW BY THIS COURT.

The Sixth Circuit properly affirmed the District Court's dismissal of the Petitioner's claims based upon 42 U.S.C. §1983. The District Court correctly held that 42 U.S.C. §1983 cannot be used to assert the violation of rights created only by Title VII. Section 1983 creates no substantive rights and only provides a remedy. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979). The claim under 42 U.S.C. §1983 was properly dismissed because Title VII provides the exclusive remedy for the

employment discrimination alleged by Petitioner. See Allen v. Denver Pub. School Bd., 928 F.2d 978, 982 (10th Cir. 1991) (per curiam). Because the Title VII claim was dismissed by the District Court based on the Petitioner's failure to exhaust his administrative remedies, the claim based on 42 U.S.C. §1983 was also properly dismissed.

Petitioner claims that the dismissal of the claim based upon 42 U.S.C. §1983 has violated his rights to substantive due process and equal protection of the law. The actions of the District Court and the Sixth Circuit Court of Appeals in dismissing this claim do not invoke Petitioner's substantive rights. In Wood v. Strickland, 420 U.S. 308 (1975), this Court stated that 42 U.S.C. §1983 does not provide a vehicle for challenging in a federal court the wisdom of decisions made by school administrators. This Court did state, however, that when a specific constitutional provision is allegedly violated by such actions of the administrators, a plaintiff should be allowed to demonstrate the existence of

such a constitutional violation. Petitioner here appears to be alleging that the Sixth Circuit's affirming the District Court's dismissal of his claims based on 42 U.S.C. §1983 is violative of procedural due process rights and equal protection under the law. This Court has never held that a proper affirmance, in itself, of a lower court dismissal of a Title VII or 42 U.S.C. §1983 claim raises due process or equal protection issues. The decision in Wood v. Strickland, 420 U.S. 308, does not hold that the court's action could be violative of constitutional rights. Rather, the actions leading to the federal lawsuit were the ones considered. Because Petitioner in the case at bar improperly filed a federal action based on Title VII prior to exhausting remedies available at the EEOC and because Petitioner's 42 U.S.C. §1983 was predicated on Title VII, both claims were properly dismissed. No courts have violated constitutional rights in this case, and the availability of judicial review has satisfied the requirements of due process.

D. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN FEDERAL RULE OF CIVIL PROCEDURE 12(a) AND CIRCUIT COURTS OF APPEAL REGARDING PROCEDURES FOR DEFAULTS.

Petitioner alleges that appellate court decisions somehow violate the dictates of Rule 12(a) of the Federal Rules of Civil Procedure. This Court has no conflict to resolve.

According to Rule 12(a) of the Federal Rules of Civil Procedure, a defendant shall serve an answer within twenty (20) days after being served with the summons and complaint. Fed. R. Civ. P. 12(a). Petitioner's Complaint was filed on July 15, 1994. (Plaintiff's Complaint; Record Document No. 1). Rule 6(a) of the Federal Rules of Civil Procedure provides that the day of the act from which the designated period of time begins to run shall not be included. Fed. R. Civ. P. 6(a). Thus, Respondents had until midnight on August 4, 1994 within which to file an Answer and not

be in default. However, Petitioner filed his request for the entry of default on August 4, 1994. Respondents were not in default until August 5, 1994, and the District Court judge properly recognized this fact at the September 30, 1994 hearing. (Motion Hearing Minutes at 8-18; Record Document No. 27). The request for default was premature.

Further, the setting aside of a default may be had for good cause shown and the discretion to set aside is vested in the trial court. United Coin Meter v. Seaboard Coastline R.R., 705 F.2d 839, 844 (6th Cir. 1983). The trial court's discretion in setting aside defaults "entails the consideration of whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." United Coin, 705 F.2d at 844. Petitioner's default against Respondents was properly set aside because Petitioner was not prejudiced by such setting aside, because Respondents obviously had a meritorious defense, and

because no culpable conduct of Respondents led to the default.

The mere fact that a plaintiff may have to wait to have his claims satisfied is not sufficient prejudice to require denial of a motion to set aside a default. Id. at 845. Rather, it must be shown that a delay will result in the loss of evidence, create increased difficulties in discovery, or provide a greater opportunity for fraud or collusion. Invst Financial Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 398 (6th Cir. 1987). In this case, none of the factors that weigh in favor of finding delay prejudicial apply.

Evidence would not have been lost, discovery of Respondents' hiring, promotion, or pay records would have been no harder to discover and there was no increased chance that any type of fraud or collusion would occur. Therefore, the granting of Respondents' motion did not prejudice Plaintiff within the meaning of the United Coin inquiry.

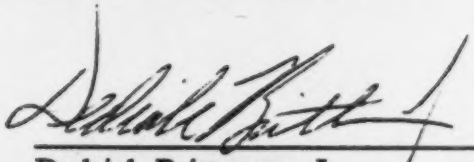
Entries of default are highly disfavored by courts. Wilson v. Winstead, 84 F.R.D. 218 (D.C. Tenn. 1979). As the district court judge noted in the case at hand, "the law favors the disposition of cases on their merits and not on default bases, because as a general proposition we don't want the law to be a trap or the rules to be so technical that justice is thwarted, but rather we want the rules to work so that justice is served." (Motion Hearing Minutes at 11; Record Document No. 27). As set forth in the extensive discussion above, Respondents have set forth clear meritorious defenses which the District Court and Sixth Circuit accepted in dismissing claims based on Title VII and 42 U.S.C. §1983. Petitioner failed to exhaust his administrative remedies by obtaining a right to sue letter from the EEOC and the District Court and Sixth Circuit properly found that this presented a meritorious defense for Respondents.

CONCLUSION

Respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The Court of Appeals' decision affirming the District Court's dismissal of Petitioner's claims based on Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1983 does not conflict with any decision of this Court or any other Court of Appeals. The Court of Appeals' conclusion that the District Court did not abuse its discretion in setting aside the entry of default does not conflict with any decision of this Court or any other Court of Appeals. There is no reason for this Court to exercise its supervisory authority here. No special or important reasons exist for granting this petition for Writ of Certiorari, and therefore, Respondents respectfully request the Petition be denied.

Respectfully submitted,

FARRIS, MATHEWS, GILMAN,
BRANAN & HELLEN, P.L.C.

By: 

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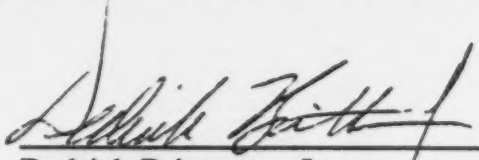
CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing have been mailed postage prepaid to Mr. Larry K. Willis, 3354 Fairbanks Street, Memphis, Tennessee on this the 21st day of February, 1996.



Dedrick Brittenum, Jr.